FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
with Supplemental Opinion)

Injury No.: 09-001639

Employee: Carolyn Brashers

Employer: Springfield Public Schools (Settled)

Insurer: Self-Insured (Settled)

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Second Injury Fund liability

On appeal before this Commission, the Second Injury Fund argues that employee was permanently and totally disabled before she suffered the January 2009 primary injury in this matter. The Second Injury Fund argues that employee has no additional disability from her work injury, and that her overall disability did not change following that injury. We disagree.

Employee testified that she had no problems sitting prior to her accident, but that now she is unable to sit for very long periods of time, and that she has trouble walking. Employee explained that after she returned from light duty to her normal job of riding busses for employer in March 2009, she was really having trouble with sitting, and she felt like her legs would give out on her when she descended the bus stairs. Employee testified that she didn't work during the summer of 2009 because of increased pain, and that from the time she went back to work in August 2009 until her separation from employment in December 2009, she was hurting a lot more than what she had before.

We find employee's testimony to be persuasive. We find that the January 2009 primary injury caused employee to suffer new and additional permanent limitations in the form of increased pain and difficulty with prolonged sitting, and increased difficulty walking.

We note that in the case of *Laturno v. Carnahan*, 640 S.W.2d 470 (Mo. App. 1982), the court rejected a similar argument from the Second Injury Fund by pointing to the inescapable fact of the employee's pre-injury employment:

> Ability to compete in the labor market is a test for permanent total disability in that it measures the worker's prospects for returning to employment. But a test for probable future employment cannot change the fact of past employment.

Id. at 473 (citations omitted).

We find the holding of the *Laturno* court dispositive of the issue herein. We believe it is consistent with the purposes of the Second Injury Fund to award compensation to an employee

who, at least up until her last injury, was tenacious enough to compete for and secure a job in the open labor market even though she was suffering from very limiting preexisting conditions.

Given the foregoing supplemental analysis, and because we otherwise agree with the administrative law judge's reasoning, we conclude that the Second Injury Fund is liable for permanent total disability benefits.

Preexisting vs. post-injury limitations

The Second Injury Fund argues the administrative law judge failed to understand the nature of employee's preexisting versus post-injury limitations. The Second Injury Fund points out that the administrative law judge found that employee had no problems with her ability to squat, crawl, kneel, or climb before January 2009, but that employee testified to the contrary in her deposition.

We do not adopt the administrative law judge's finding that employee had no problems with her ability to squat, crawl, kneel, or climb before January 2009. We find, instead, that employee felt that she was unable to crawl and squat and that she had problems climbing stairs, and that she would need a cushion for kneeling.

We have carefully reviewed the transcript, and we are convinced that we understand the facts referable to employee's preexisting and post-injury limitations. Accordingly, with the exception of the inaccuracies identified herein, we agree with and adopt the administrative law judge's findings.

Conclusion

We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge Margaret Ellis Holden issued November 28, 2012, is attached and incorporated by this reference.

We approve and affirm the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 17th day of July 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED

James G. Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that the decision of the administrative law judge awarding permanent total disability benefits against the Second Injury Fund is in error, and should be reversed.

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." The Fund is liable for permanent total disability benefits only where the work injury combines with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007).

Before the primary injury in this case, this 63-year-old employee suffered from an overwhelming array of preexisting disabling conditions of ill-being, including Moyamoya disease (causing headaches, seizures, and balance problems), chronic low back pain, bilateral carpal tunnel syndrome with surgeries, bilateral knee surgeries including a total knee replacement on the right, a C5-C6 discectomy and fusion, right rotator cuff tear with surgery, a fractured right ankle, diagnoses of fibromyalgia and osteoarthritis affecting both upper and lower extremities, a diagnosis of depression, and multiple other surgeries including a partial hysterectomy, appendectomy, craniotomy, surgeries to both feet, bladder suspension, and gallbladder surgery. After she was determined eligible for Social Security Disability benefits in 1992, employee spent approximately fifteen years out of the work force before going to work at a dress shop working only 8 hours per week. Employee left that job because she was unable to perform her duties owing to her bilateral upper extremity problems. From there, employee took a part-time job with employer.

Before the work injury, employee had medical restrictions limiting her to sedentary work, was unable to perform prolonged activity on her feet, was limited in her ability to crawl, climb, and squat, was unable to perform overhead work on a sustained basis, was unable to bend without pain, and was unable to perform any repetitive upper extremity activities such as pinching and grasping. Employee only worked about 6.5 hours per day for employer from March 2007 to May 2007; this was reduced to 4 hours per day during June and July 2007; and reduced even further in August 2007, when employee stopped riding the noon bus route. Instead, employee would go home and take a nap during the noon hour. Employee explained that she had to reduce her hours for employer because the job was taking a toll on her.

All of the foregoing are limitations that employee suffered *before* the primary injury; all of the foregoing are classic indicators for permanent total disability. I believe the vocational expert, James England, most persuasively evaluated employee's preexisting condition when he opined that employee was permanently and totally disabled before the work injury. In rejecting Mr. England's testimony, the majority fails to note that even employee's own medical expert, Dr. Parmet, agreed that he might have found employee to be permanently and totally disabled had he seen her for purposes of an independent medical evaluation in 2005.

I disagree with the majority's reasoning finding the fact of employee's employment at the time of the primary injury to be conclusive proof of her ability to compete in the open labor market. Far from dispositive, I read *Laturno v. Carnahan*, 640 S.W.2d 470 (Mo. App. 1982) as a case that speaks to the timing of payments from the Second Injury Fund. The dicta cited by the majority for abandoning the well-established test for permanent total disability cannot change the reality that if this employee were pointing to the same limitations and disabling conditions *after* a work injury, no reasonable person could seriously contend that she was capable of competing for work in the open labor market. The conclusion that this employee was not permanently and

totally disabled prior to the work injury runs directly contrary to a long history of decisions from administrative law judges, this Commission, and from the courts awarding permanent total disability benefits to employees with similar, or even less limiting, disabilities.

I believe the majority's position is also inherently contradictory. If we are to regard the fact of an employee's past employment as dispositive proof that she was not permanently and totally disabled before the work injury, I fail to see how we can then conclude that this employee was rendered permanently and totally disabled after the work injury—where employee went back to the same job. It is uncontested that employee was showing up and performing her job in line with employer's expectations until December 2009, almost a full year after the primary injury. If the fact of employee's working this job is dispositive proof of her ability to compete in the open labor market before the work injury, why is it not dispositive afterward? The majority's analysis does nothing to relieve this contradiction.

In sum, I find no support in the Missouri Workers' Compensation Law for the proposition that we should throw out the test for permanent total disability simply because the employee was able to work very limited hours for employer performing a largely sedentary job that was so difficult for her that it required her to take a nap during the day. I disagree with the majority's choice to credit the vocational expert testimony from Michael Lala. I credit instead Mr. England and find that employee was permanently and totally disabled before the work injury of January 8, 2009. It follows that there is no Second Injury Fund liability under § 287.220.1 RSMo, because there can be no "combination" of disabilities where employee was already permanently and totally disabled at the time of the primary injury. I would reverse the decision of the administrative law judge.

Because the majority has determined otherwise, I respectfully dissent.

James G. Avery, Jr., Member

AWARD

Employee: Carolyn Brashers Injury No. 09-001639

Dependents: N/A

Employer: Springfield Public Schools

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

Insurer: Self-insured

Hearing Date: 8/29/12 Checked by: MEH

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? YES
2. Was the injury or occupational disease compensable under Chapter 287? YES
3. Was there an accident or incident of occupational disease under the Law? YES
4. Date of accident or onset of occupational disease: 1/8/09
5. State location where accident occurred or occupational disease was contracted: GREENE COUNTY, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? YES
7. Did employer receive proper notice? YES
8. Did accident or occupational disease arise out of and in the course of the employment? YES
9. Was claim for compensation filed within time required by Law? YES
10. Was employer insured by above insurer? YES
11. Describe work employee was doing and how accident occurred or occupational disease contracted: CLAIMANT TRIPPED AND FELL.
12. Did accident or occupational disease cause death? NO Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: BODY AS A WHOLE
14. Nature and extent of any permanent disability: 12.5%
15. Compensation paid to-date for temporary disability: $0
16. Value necessary medical aid paid to date by employer/insurer? $7,155.68

Employee: CAROLYN BRASHERS Injury No. 09-001639

17. Value necessary medical aid not furnished by employer/insurer? N/A

18. Employee's average weekly wages: N/A

19. Weekly compensation rate: $204.88

20. Method wages computation: BY AGREEMENT

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: N/A

0 weeks of temporary total disability (or temporary partial disability)

0 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning N/A, for Claimant's lifetime

22. Second Injury Fund liability: Yes X No Open

0 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: N/A

Permanent total disability benefits from Second Injury Fund:
weekly differential $0 payable by SIF for 50 weeks, beginning 12/12/09,
and, $204.88 thereafter, for Claimant's lifetime

TOTAL: SEE AWARD

23. Future requirements awarded:

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

DARREN MORRISON

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Carolyn Brashers Injury No. 09-001639

Dependents: N/A

Employer: Springfield Public Schools

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

Insurer: Self-insured

Hearing Date: 8/29/12 Checked by: MEH

The parties appeared before the undersigned administrative law judge on August 29, 2012, for a final hearing. The claimant appeared in person represented by Darren Morrison. The employer and insurer did not appear as the claim against the employer and insurer was previously settled. The Second Injury Fund appeared represented by Cara Harris.

The parties stipulated to the following facts: On or about January 8, 2009, Springfield Public Schools was an employer operating subject to the Missouri Workers' Compensation Law. The employer's liability was fully self-insured. On the alleged injury date of January 8, 2009, Carolyn Brashers was an employee of the employer. The claimant was working subject to the Missouri Workers' Compensation Law. On or about January 8, 2009, the claimant sustained an accident which arose out of and in the course and scope of employment. The accident occurred in Greene County, Missouri. The claimant notified the employer of her injury as required by Section 287.420 RSMo. The claimant's claim for compensation was filed within the time prescribed by Section 287.430 RSMo. At the time of the accident, the claimant's average weekly wage was sufficient to allow a compensation rate of $ 204.88 for temporary and permanent total disability compensation, and permanent partial disability compensation. No temporary disability

benefits have been paid by the employer and insurer. The employer and insurer have paid medical benefits in the amount of $7,155.68. The parties agree that claimant reached maximum medical improvement on December 12, 2009. The attorney fee being sought is 25%.

ISSUES:

1. The nature and extent of permanent disabilities.
2. The liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability.

Employee offered the following exhibits, which were admitted:

Exhibit A	Deposition of Dr. Brent Koprivica with exhibits
Exhibit B	Deposition of Michael Lala with exhibits
Exhibit C	Deposition of Carolyn Brashers, with exhibit
Exhibit D	Stipulation for Compromise Settlement in Injury No. 09-001639
Exhibit E	Medical records contained in a binder, including the records of Dr. Robert Scanlon, Dr. Gigi Baker, Cox Medical Center, Burrell Behavioral Health, Cox Occupational Medicine, Peak Performance and Ferrell Duncan Clinic

The Second Injury Fund offered the following exhibits, which were admitted:

Exhibit I	Deposition of James England, Jr., with exhibits
Exhibit II	Deposition of Allen Parmet, with exhibits

The Court also took Judicial notice of certain records maintained by the Division of Workers' Compensation, including the Claims and Answers filed by the parties.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Claimant testified at the hearing by way of deposition dated June 10, 2010.

The Claimant was born on October 10, 1948. She is 63 years old as of the date of the hearing.

The Claimant graduated from high school in 1967, having been forced to repeat the first grade. Her grades were very poor in school. She has not completed any additional education. She has no additional vocational training, technical training, and is "very slow" working on a computer keyboard.

Claimant worked in the remote past for a company in Greenfield, Missouri sewing jackets. She started working for French's Mustard in approximately 1978, and continued working there for the next 15 years. She packaged bottles for a short time before working in sanitation, where her activities included sweeping, mopping and using power hoses to clean the production line. She lost her job at French's after suffering a series of strokes due to Moyamoya disease, which left her with a seizure disorder. She continues to have difficulties maintaining her balance as a result of the Moyamoya disease.

Claimant received Social Security Disability in 1992. She worked for Ferris Dress Shop for about a year. She worked about 8 hours a week but was unable to continue because it hurt her hands to hang the clothes and pin the pants on the hangers.

Claimant went to work for the school system directly after working at Ferris. She started in March 2007 as a bus monitor. Her duties included monitoring the children. If there was a special needs child she would ride with them and take care of their needs. She rode both smaller handicap buses and regular buses. She worked both the regular year and summer school. When she started she rode three routes a day, morning, noon and afternoon. She had several special needs children. Sometimes she would help them with the wheelchair lift and secure them into the bus, other times she just rode with them. She rode two hours in the morning, and hour and a half at noon, and three hours in the evening, totaling about six and a half hours a day, five days a week. During the summer session she had two routes for about four hours a day.

Claimant testified that she was having some difficulty with the job. She was required to be at the bus barn at 6 a.m. and finished the day at 5 p.m., although she did take breaks between routes. During the 2007/2008 school year she was able to eliminate the noon route to give her time to rest during the day.

Claimant was not having any problems sitting. Although her lower extremities caused her problems with prolonged activity on her feet, specifically standing and walking, she did not have problems with her ability to squat, crawl, kneel, or climb before January 2009.

Claimant also had difficulties with her upper extremities in the past, which resulted in bilateral carpal tunnel releases and bilateral ulnar neuropathies at the elbow, as well as diagnosis of fibromyalgia. She also had a right rotator cuff tear, which was surgically treated in the past. She had surgeries to both knees as well as a right total knee arthroplasty in the past. Claimant has had difficulties with both her neck and low back prior to her last work injury, resulting in an anterior cervical diskectomy and fusion at C5-C6, and she was diagnosed with annular tears at L3-L4 and L4-L5, as well as an L4-L5 disc herniation. She was limited in her tolerances to bending, pushing, pulling or twisting prior to her last work injury, as well as limited in her ability to perform repetitive tasks, including pinching or grasping. She also had surgeries to both feet, fractured right ankle, partial hysterectomy, gallbladder surgery, an appendectomy, a craniotomy, a bladder suspension, and rectum surgery. She has been diagnosed with depression.

In the fall of 2008 she worked a morning and afternoon route, totaling about five hours a day. She was working on a big bus that had some special needs children. Claimant's last work injury occurred on January 8, 2009. Her injury occurred when she tripped on an uneven surface on a sidewalk and fell face first. She was seen in the emergency room at Cox Medical Center and underwent a CT scan of her head and neck, and was noted on follow-up with Dr. Pirotte to have a lumbar strain resulting from her fall. She injured her nose and broke a tooth. Claimant

was released from Dr. Bisbey's care for her tooth on February 13, 2009. She also complains of sciatica on the left as a result of the injury of January 8, 2009. She described her problems as, "now I cannot sit for very long periods of time, and I have trouble walking. I – it starts in my lower back, my sciatic, and it goes down both my legs, and my legs and feet get numb." She did not have these problems before the fall.

Claimant worked light duty in the office for about five hours a day. She returned to the bus in March 2009. She was having trouble sitting on the bus and would have to move from seat to seat. When she exited she felt her legs were going to go out from underneath her. She did not work the summer of 2009 because she was hurting. In the fall of 2009 she returned and worked with children that did not have any physical handicaps but just needed assistance. She was having the same problems sitting and getting on and off the bus. She was terminated December 11, 2009, after seeing Dr. Koprivica and he concluded she should not be working. She testified that she wanted to finish the school year despite the job being harder for her to do because she was having increasing pain. The Employer ultimately settled this claim for 12.5% of the body as a whole.

Dr. Koprivica examined the Claimant at the request of her attorney on August 14, 2009. Dr. Koprivica opined that Claimant's pre-existing disabilities are equal to 75% of the body as a whole, and that her last work injury is appropriately assigned a 15% body as a whole rating. Dr. Koprivica also opined that based on Claimant's overall presentation it is unrealistic to believe that any ordinary employer would employ her and he assigned numerous restrictions for both her last work injury and her pre-existing disabilities. Dr. Koprivica further opined that she was permanently and totally disabled due to the combination effect of her pre-existing disabilities with the disability resulting from the injury of January 8, 2009.

Dr. Allen Parmet performed a records review at the request of the Second Injury Fund. Dr. Parmet took notice of her prior conditions including Moyamoya, cervical and lower back conditions, carpal tunnel, right shoulder rotator cuff repair, osteoarthritis to both knees with total knee replacement on the right, major depression, and pancreatitis. He found these conditions resulted in ongoing disability for the claimant prior to January 8, 2009. He testified that at the time she went to work for Springfield Public Schools in 2007 she was functioning at the sedentary level with accommodations. He did not feel she could work at the sedentary level full time because she reduced her hours. He concluded that due to the simple arithmetic sum of her various conditions and the fact she was on Social Security Disability, she was totally disabled. In his opinion, she sustained a possible cervical strain, a low back strain, facial contusions and bruising which resolved. He does not believe that she has any additional disability resulting from the January 8, 2009, injury.

The Claimant was evaluated by Michael Lala, a Vocational Rehabilitation Counselor, at the request of her attorney. The evaluation took place on July 20, 2010. Mr. Lala opined that Claimant is permanently and totally disabled due to the combination effect of her pre-existing disabilities with the disability resulting from her January 8, 2009 injury. He did not find her permanently and totally disabled before January 8, 2009, because she was gainfully employed in a job that she obtained and was able to complete the job as her employer required. He would not have expected her to be able to maintain her employment for two and one half years if she was permanently and totally disabled.

James England, also a Vocational Rehabilitation Counselor, testified on behalf of the Second Injury Fund. Mr. England reviewed claimant’s medical records and deposition. Mr. England opined that prior to the last injury claimant had significant problems as far as functioning and was one of the reasons she had been put on Social Security Disability. He found

that the job she was doing for the Springfield Public Schools "is a job in the open labor market but it certainly, normally, involves more than working 20 hours a week." He did not feel the work injury of January 2009 impacted claimant's employability, and concluded she was permanently and totally disabled for Missouri Workers' Compensation purposes when she become permanently and totally disabled for Social Security purposes back in 1992, despite the fact that she had worked at a dress shop in the interim and then for Springfield Public Schools as a bus monitor beginning in March of 2007.

At the time of her deposition, June 10, 2010, claimant could sit for 30 minutes, stand for one and one half hours, and walk half a block. She did not have problems sitting or standing before her work injury of January 8, 2009.

After carefully considering all of the evidence, I make the following rulings:

1. The nature and extent of permanent disabilities.

I find that prior to January 8, 2009, claimant had injuries that constituted a hindrance or an obstacle to employment; namely, cervical discectomy and fusion; bilateral carpal tunnel releases; rotator cuff repair to her right shoulder; surgery to her right and left knees; total knee replacement of her right knee; surgeries to both feet; psychiatric issues; fractured right ankle; diagnosis of bilateral ulnar neuropathy, osteoarthritis, and fibromyalgia to both upper extremities; low back pain, and Moyamoya disease. As a result of the last injury of January 8, 2009, she sustained an injury to her neck and low back. The extent of disability of claimant for the last injury of 15% of the body as a whole at the 400-week level, as reflected in the Stipulation for Compromise Settlement entered into by the claimant and employer and insurer.

2. The liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability.

Section 287.220.1 RSMo states that when an employee has a preexisting permanent partial disability sufficient to constitute a hindrance or obstacle to employment and subsequently sustains a compensable work injury resulting in additional disability, and these disabilities combine to create an additional permanent disability, the employer, at the time of the last injury, shall be responsible only for the degree or percentage of disability resulting from the last injury. After the disability from the last injury, standing alone, has been determined, the degree of disability attributable to all the injuries sustained is determined. The degree of disability from the last injury is deducted and the Second Injury Fund is liable for the balance. If the last injury, combined with prior injuries or disabilities, results in the claimant being unable to compete in the open labor market, and is thus permanently and totally disabled, the minimum standards for disability do not apply. If the claimant is found to be permanently and totally disabled, the Second Injury Fund is liable for benefits after the completion of payment by the employer for the disability due to the last injury.

I do not find it necessary that a claimant be working a 40 hour week at the time of the last injury to be eligible for workers' compensation benefits. Claimant was capable of working in the open labor market, and in fact was, at the time of the last injury. Her work day was from 6 a.m. when she was to report at the bus yard, until about 5 p.m. after the afternoon route was completed, although she worked a split shift of two or three hours at a time. She was able to work these two and three hour shifts without a break.

I find that prior to January 8, 2009, claimant had injuries that constituted a hindrance or an obstacle to employment. I find that she was not permanently and totally disabled before this date as she was able to compete in the open labor market as she obtained and maintained employment as a bus monitor for two and one half years before the work injury of January 8, 2009. This was not an accommodated job structured for her by her employer. This was a regular

job in Springfield School District. Furthermore, the fact that she has been awarded Social Security Disability is not controlling as it is based upon a different standard than the Missouri Workers' Compensation law.

Based upon the testimony of Dr. Koprivica and Mr. Lala, I find that the claimant is unable to compete in the open labor market as a result of the combination of these prior injuries and the injury to her neck and back that is the subject of this claim. Therefore, I find that the Second Injury Fund is liable for permanent total disability. The claimant settled her claim against the employer and insurer for a total of 50 weeks representing 12.5% of the low back at the 400-week level. I find that the claimant was at maximum medical improvement as of December 12, 2009, and that she has been permanently and totally disabled since this date as a result of the combination of her prior conditions and her injury of January 8, 2009. Accordingly, the Second Injury Fund shall pay no weekly differential for 50 weeks beginning December 12, 2009, and then $204.88 weekly for claimant's lifetime.

This award is subject to modification as provided by law.

Attorney for the claimant, Darren Morrison, is awarded an attorney fee of 25%, which shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

Made by: /s/ Margaret Ellis Holden
Margaret Ellis Holden
Administrative Law Judge
Division of Workers' Compensation